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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-388

HALCON INTERNATIONAL, INC.,
Petitioner,

v.

MONSANTO AUSTRALIA LIMITED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE ANNEXED PETITION FOR REHEARING WHEN GROUNDS FOR PETITION AROSE AFTER EXPIRATION OF TIME PRESCRIBED IN RULE 58(2)

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Petitioner respectfully moves for leave to file the annexed petition for rehearing of the order of this Court denying the petition for writ of certiorari in this case, entered on November 9, 1971. As the annexed petition for rehearing shows, the ground for rehearing is that on December 7, 1971 this Court granted certiorari in *International Union of Operating Engineers* v. *Flair Builders, Inc.* No. 71-41, October Term, 1971, a case which involves issues in the area of labor arbitration identical with issues presented in this case in the area of commercial arbitration. The petition argues that this Court should reconsider its denial of certiorari in this case because it is desirable to have a simultaneous review of both *Flair* and this case.

As pointed out more fully in the annexed petition, simultaneous review will not only permit consideration of similar issues at the same time, but will also permit exploration and clarification of parallel policies of the Labor Management Relations Act and the Federal Arbitration Act. Moreover, we show that it would be manifestly unfair for this Court to affirm the decision in *Flair* without reversing the decision in the instant case. Finally, even if this Court reverses *Flair,* it may do so on a rationale which would nevertheless compel the reversal of the instant case.

Although the time for rehearing in this case expired on December 5, 1971, the ground on which rehearing is sought did not arise until December 7 with the grant of certiorari in *Flair.* We have submitted this petition as promptly as possible after learning of this grant of certiorari. In these circumstances, this Court clearly has the power, in its discretion and in the interests of justice, to entertain the petition. See, *e.g., Gondeck* v. *Pan American World Airways,* 382 U.S. 25 (1962); *United States* v. *Ohio Power,* 353 U.S. 98 (1955).

Respectfully submitted,

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PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on November 9, 1971, and (2) granting the petition. Petitioner submits that this Court's grant of certiorari in *International Union of Operating Engineers* v. *Flair Builders, Inc.* No. 71-41, October Term, 1971, on December 7, 1971, is an intervening circumstance of substantial and controlling effect which justifies rehearing in this case.

The petition for certiorari in this case sought review of a 2-to-1 Seventh Circuit decision (1) holding that in an action to compel arbitration under the Federal Arbitration Act (9 U.S.C. §§1-14) the defense of laches in invoking arbitration was not for the court, but was for the arbitrator, and (2) refusing to apply its own recent decision in *International Union of Operating Engineers* v. *Flair Builders, Inc.*, 440 F.2d 557 (7th Cir. 1971) that in labor arbitration cases the issue of laches was for the court, on the reasoning that different policies under the Federal Arbitration Act and the Labor Management Relations Act purportedly justified this inconsistency. This Court's grant of certiorari in *Flair* provides a unique opportunity for this Court to resolve, once and for all, the similar issues arising in commercial and labor arbitration cases by reviewing this case simultaneously with *Flair*.

Review of *Flair* will necessarily involve this Court in a consideration of important issues common to both *Flair* and the instant case. Should there be a single standard applicable to both commercial and labor arbitration contracts on the question of laches? If so, should that standard be the one applied by the Seventh Circuit in *Flair*, or the one applied by the Seventh Circuit in this case? Is the standard to be applied in labor cases an appropriate standard in commercial cases? In light of the specific language in section 2 of the Federal Arbitration Act, and the special legislative history of the Federal Arbitration Act, should the issue of laches be for the court in commercial arbitration cases even if, because of the unique importance of arbitration in resolving industrial strife, laches is for the arbitrator in labor arbitration cases?

The time is particularly appropriate for resolving these issues as they affect commercial arbitration. Prior to this Court's decision in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), the law was clear that in actions to enforce commercial arbitration contracts laches was for the court. Following *Prima Paint,* lower federal court judges have divided on the effect of *Prima Paint* on this issue. In the only appellate decisions, the Second and Seventh Circuits in 2-to-1 decisions read *Prima Paint* to support their conclusion that the issue is for the arbitrator. The Chief Judges in both circuits wrote dissents giving a contrary reading to *Prima Paint.*

Unless this Court hears the instant case together with *Flair,* an affirmance in *Flair* would result in a highly unsatisfactory situation in which different standards were applied in labor and commercial cases, and with the standard in commercial cases still unsettled under this Court's decision in *Prima Paint.* Even if this Court reverses *Flair,* there will still remain an unresolved question as to whether a similar result is warranted under the Federal Arbitration Act. On the other hand, by hearing and considering the instant case simultaneously with *Flair,* this Court will have an opportunity to resolve with finality the interrelated issues in these cases on as full and complete an argument as possible.

Under all these circumstances, reconsideration of the petition for certiorari is appropriate here. Indeed, this Court has on many occasions, subsequent to its denial of certiorari, reversed itself *sua sponte* when it granted review in a case raising the same or similar issues. *See, e.g.,*

United States v. *Ohio Power,* 353 U.S. 98, 99 (1955); *Bowden* v. *Fort Smith,* 316 U.S. 584, 589 (1942); *Helvering* v. *Sprouse,* 316 U.S. 604 (1942), 318 U.S. 604 (1942); *Douglas* v. *Willcuts,* 295 U.S. 722 (1935); *cf. Gondeck* v. *Pan American Airways,* 382 U.S. 25 (1962).

Conclusion

For the reasons set forth above, as well as those contained in its petition for writ of certiorari, petitioner prays that this Court grant rehearing of its order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

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Certificate of Counsel

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

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